IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1786 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ABDUL RAZAK HUSAIN MATDAR

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

Mr. DP Joshi, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 24/04/2001

ORAL JUDGEMENT

The present petition is preferred by the petitioner-detenu Abdul Razak Husain Matadar who has been detained by an order of the District Magistrate, Dahod

dated 5.8.2000 in exercise of powers under sub section (1) of section 3 of the Gujarat Prevention of Anti Social Activities Act, 1985 (hereinafter referred to as "the PASA Act"). The petitioner challenges the impugned order of detention availing the protection under Article 21 and 22 of the Constitution of India and had, therefore, approached this court with this petition under Article 226 of the Constitution of India.

In this petition, rule was issued by this court on 12.3.2001 and it was made returnable after three weeks and the office was directed to place this petition for final hearing after service of rule in seriatim as per chronological order of actual date of execution of the detention order on the detenu. Though sufficient opportunities were given to the respondent authorities, the respondents have not filed the affidavit in reply in this petition.

2. The facts of the case are that, an order of detention came to be passed by the District Magistrate, Dahod on 5.8.2000 on the ground that about six offences are registered against the petitioner involving him in the offences punishable under section 186, 332, 394, 380,457, 395, 397, IP Code and section 25(1) A of the Arms Act The detaining authority recorded subjective satisfaction about the petitioner being a dangerous person as defined under section 2(c) of the PASA Act. The statements of the witnesses whose identity has not been disclosed in exercise of privilege under section 9(2) of the PASA Act, have also been considered by the detaining authority and he, therefore, ultimately came to the conclusion that there is no other remedy but to detain the petitioner under PASA to prevent him from pursuing his illegal and anti social activities.

3. The petitioner has challenged the impugned order of detention on various grounds raised in the petition. However, during the course of hearing of the present petition, Ms. Patel the learned advocate for the petitioner has submitted that there is non application of mind by the detaining authority on the question of considering the possibility of cancellation of bail in the event the petitioner is released on bail. She has further submitted that the petitioner was, in fact, in judicial custody at the time when the impugned order of detention came to be passed and, therefore, the detaining authority was having a better option of opposing the grant of bail and the second option of getting the bail cancelled, if at all granted. This aspect has not been considered by the detaining authority while considering

the lesser drastic remedy. Ms. Patel, learned advocate appearing for the petitioner herein has confined her arguments to this aspect and has further submitted that in view of the decision taken by a Division Bench of this Court in Letters Patent Appeal No. 1056 of 1999 in Special Civil Application No. 8650 of 1998 on 15.9.1999, there is gross non application of mind on the part of the detaining authority. In that case, the detenues were on bail and the question of getting the bail cancelled was not considered by the detaining authority and the Court held that there is non application of mind. According to Ms. Patel, learned advocate for the petitioner detenu, the case of the petitioner stands on a better footing since the detenu was in judicial custody when the impugned order of detention was passed and, therefore, the authority ought to have considered the possibility of resorting to the remedy of opposing the grant of bail or in event it is granted, of getting the bail cancelled, which has not been done by the detaining authority and, therefore, this petition may be allowed.

4. Mr. D.P. Joshi, the learned Asstt. G.P. appearing for the respondent authority has opposed the present petition. According to him, the decision of this court in the case of Mamad Abbas Jasraya v/s. Additional Chief Secretary, Government of Gujarat, Home Department and others reported in 1994 (2) GLR 1209 will be squarely applicable to the facts of the present case. In the said decision, the detenu was in custody and the Court came to the conclusion that considering the antecedents of the detenu, it was necessary to detain him even while he was in custody. According to Mr. Joshi, in the instant case, the petitioner has been involved in six registered offences as per the grounds of detention and has also been involved in the offences which have not been registered, as per the statements of the secret witnesses and, therefore, the impugned order of detention cannot be said to be vitiated on the ground of non application of mind.

5. Having regard to the facts of the case, there is no dispute about the factual aspect that the petitioner is involved in six offences involving him in offences as aforesaid of the Indian Penal Code. It is also not in dispute that when the impugned order of detention was passed, the petitioner was in judicial custody. In the grounds of detention the detaining authority has considered that such activities of the petitioner detenu cannot be prevented by resorting to the general law because following of the general process of law would be the time consuming process and in the mean time, there

has been full possibility that the petitioner may continue to indulge in such criminal anti social activities endangering public interest and public order, The detaining authority has also not considered that the proceedings under section 437(5) for cancellation of bail can be initiated in the event the petitioner is enlarged on bail. In this matter, the respondents have not chosen to file the affidavit in reply. Therefore, the averments made in the petition have gone uncontroverted, unchallenged. When the petitioner has raised specific contention in the petition that the petitioner was in judicial custody at the time of passing the impugned order and, therefore, exercise of powers under the PASA for detaining the petitioner was not justified as there was no urgent threat to the maintenance of public order, the respondents ought to have come forward with a specific case as to whether the petitioner was in judicial custody at the relevant point of time or not. In absence of the reply, this COurt is having no other option but to accept the contention that the petitioner was in judicial custody at the time when the impugned order of detention was passed.

6. It is true that this Court, in the case of Mamad Abas Jasraya (supra), this Court has observed as under:

> "Now, taking this ratio of the judgment and applying to the facts of the present case, it is clear from the grounds of detention itself that the detaining authority was aware of the fact that the petitioners were in custody. Further, the detaining authority was also aware of the fact that previously, the petitioners had made frequent applications for bail in the lower court and further looking to the nature of the antecedent activity namely illegal importing of such huge quantity of contraband gold would clearly indicate that they would certainly make applications for bail to the higher courts and after their release, they would engage in any such activities and, therefore, it was necessary to detain the petitioners in order to prevent them from engaging in such activities. "

But, at the same time, in a more recent judgment relied upon by Ms. Patel in Letters Patent Appeal Appeal No. 1056 of 1999 in Special Civil Application No. 8650 of 1998 dated 15.9.1999, in case of Yunusbhai Hasanbhai Ghanchi versus District Magistrate, this court, after considering the decision of the division bench of this Court in case of Zubedabibi Rasidkhan Pathan v/s. State

of Gujarat and others reported in 36(2) GLR 1134, came to the conclusion that the detaining authority has to consider the question of cancellation of bail. In that case, the detenu was on bail and the authority has not considered the possibility of getting the bail cancelled and the court has, therefore, held that there is non application of mind by the detaining authority.

In the instant case, the detenu is on better footing. He was in judicial custody at the time when the impugned order of detention came to be passed. Therefore, the detaining authority could have considered the remedy of opposing bail application before the court and if granted, thereafter, there was an option of having resort to section 437 (5) of the Code of Criminal Procedure. From the bare reading of the grounds of detention communicated to the detenu under section 9(2) of the PASA Act, it does not appear that the detaining authority has taken into consideration that the bail application, if preferred by the petitioner, can be opposed. The detaining authority therefore could and should have considered the question of possibility of opposing the bail application, if it is preferred by the petitioner before the Magisterial Court and ought to have considered the possibility of non grant of bail. The detaining authority ought to have considered a further possibility of getting the bail cancelled in the event the court did not accept the opposition to the grant of bail. If the detention order is seen alongwith the grounds of detention, it is amply clear that these material aspects have not been considered by the detaining authority. This is, therefore, a case of clear non application of mind on this important and vital aspect and, therefore, the subjective satisfaction would stand vitiated. Non consideration of such lesser drastic remedy has vitiated the subjective satisfaction of the detaining authority. On this ground alone, the petition deserves to be allowed.

For the reasons recorded in the oral judgment, the petition succeeds and the same is allowed. The order of detention dated 5.8.2000 is vitiated and resulted to quash and set aside. The detenu Abdul Razak Husen Matadar who has been detained at the District Jail, Bhavnagar be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is

Permitted.

Dt. 24.4.2001. (H.K.Rathod,J.)

Vyas